

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 13204 OF 2017

Neelima Rajkumar Babar & anr. ... Petitioners.
Versus
Sainath Maruti Hajare & anr. ... Respondents.

Mr. Kalpesh U. Patil, advocate for petitioner.

Mr. Prabhanjan Gujar, advocate for respondent No. 2.

CORAM : SMT.SADHANA S. JADHAV,J

DATE : DECEMBER 8, 2017

P.C.:

1 Heard the learned Counsel for the petitioner and the learned Counsel for the respondent No. 2.

2 Rule. Rule made returnable forthwith with the consent of the parties.

3 The Petitioners are the original plaintiffs in Regular Civil Suit No. 54 of 2007 which is now renumbered as Regular Civil Suit No. 96 of 2012 before the Civil Judge, J.D., Karad. The suit is for partition and possession.

4 The issues are framed. Recording of evidence has commenced. The petitioners had filed an application under Order 26 Rule 2 read with section 151 of the Civil Procedure Code seeking the relief of appointing the Court Commissioner to cross-examine the petitioner No. 2 Saraswati Maruti Veer. Application was filed on 26/10/2017 alongwith Medical case papers. The Petitioner No. 2 had filed the records of Krishna Hospital & Medical Research Centre, Karad, which shows that the Petitioner was admitted on 21/9/2017 and was discharged on 26/9/2017. The Petitioner was diagnosed with obstructive Bronchiolitis and she is kept under evaluation. She is also diagnosed with hepatitis B positive status. The petitioner No. 2 has to be administered with oxygen and hence, the receipt of Suyog Oxygen & Acetylene Co. were annexed to the hospital. Hence, this Writ Petition.

5 The learned Court has observed that the previous application below Exh. 94 was filed on 7/9/2017 seeking the same relief and it was rejected on merits on 12/10/2017. That the said order was not

challenged. According to the learned Court, there was no reason to take another view since medical certificate shows that she was admitted between 21/9/2017 to 26/9/2017. However, it is clear from the record that she was admitted in the hospital after filing of the application on 7/9/2017.

6 It is admitted position that the petitioner No. 2 happens to be the octogenarian. She is more than 87 years. On the earlier date of the hearing, the learned Counsel for the respondent had submitted photograph showing that the Petitioner No. 2 was hail and hearty and she could cross road. However, today photograph, which was taken on 6/12/2017 is placed on record, which shows that the Petitioner No. 2 is bedridden and is on oxygen. Copy of the photograph is taken on record and marked as Article "X" for the purpose of identification.

7 Taking into consideration the above mentioned aspects, it would be necessary to appoint Court Commissioner to cross-examine witness at her residential house. However, the learned Counsel for

the Petitioners on instructions undertakes that no other members of the family would be present at the time of cross-examination to rule out any prompting. It is also submitted that the petitioners would cooperate at her best with the Court commissioner. The advocate representing the deponent is permitted to remain present. The defendant is at liberty to remain present. However, he shall not obstruct during the course of cross-examination.

8 With these directions, the Petition is allowed. The impugned order dated 9/11/2017 is hereby quashed and set aside. The Petitioners shall give a date on which cross-examination can be conducted at home with the permission of the Court. Rule is made absolute in the above terms. Writ Petition is disposed of accordingly.

The parties to act on the authenticated copy of this order.

(SMT. SADHANA S. JADHAV,J)